

LARRY L. LEDLOW
FLORENCE LEDLOW

IBLA 89-603

Decided October 30, 1990

Appeal from a decision of the Townsite trustee, Alaska State Office, Bureau of Land Management, rejecting in part applications for trustee deeds to townsite lots. AA USS 5507.

Set aside and referred to Hearings Division.

1. Administrative Authority: Generally--Administrative Procedure: Hearings--Alaska: Townsites.

Where the record is too vague to support a townsite trustee's determination that applicants for certain townsite lots did not occupy those lots prior to repeal of the Townsite Acts on Oct. 21, 1976, and hence did not qualify for trustee deeds to those lots, the Board will order a hearing pursuant to 43 CFR 4.415, to resolve questions of fact concerning applicants' alleged occupancy on the crucial date.

APPEARANCES: Larry L. Ledlow and Florence Ledlow, pro sese; Timothy E. Troll, Esq., Anchorage, Alaska, for City of St. Mary's.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Larry L. Ledlow and Florence Ledlow have appealed a July 6, 1989, decision of the townsite trustee, Alaska State Office, Bureau of Land Management (BLM), rejecting in part their applications for trustee deeds to various townsite lots filed pursuant to section 11 of the Act of March 3, 1891, 43 U.S.C. § 732 (1970) (repealed by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2790 (1976), effective October 21, 1976, subject to valid existing rights).

On November 8, 1975, St. Mary's Native Corporation and the Nerklumute Native Corporation formed the Quqaqliq Joint Venture for the purpose of developing, subdividing, and improving a parcel of land designated as Tract B (a portion of the Andreafsky townsite), U.S. Survey 5507. Paul Dixon, General Manager of St. Mary's Native Corporation and representative of Quqaqliq, arranged for survey of Tract B which was completed in August 1976. The plat of survey was submitted to Alaska townsite trustee, George Gustafson, in November 1976. The plat of the "Quqaqliq Subdivision" was approved by the City Council of St. Mary's on September 11, 1985.

On July 19, 1987, appellants filed two applications for trustee deeds to lots 3 and 4, block 10, and lots 8 and 9, block 11, USS 5507, Andreafsky Townsite. Appellants claimed occupancy of the land embraced by these lots since September 1975. They alleged in their applications that in 1973 one Larry D. Budde staked out a claim on a 400- by 400-foot parcel of land encompassing what was later to be designated as lots 3, 4, 8, and 9, and built a cabin on lot 4, block 10. In their statement of reasons (designated "Appeal") and filed on August 28, 1989, appellants assert that the Budde cabin was built "approximately in the middle of this (400ft. x 400ft.) piece of ground." On September 22, 1975, Budde sold the cabin and his interest in the land to Florence Ledlow. Appellants submitted a handwritten bill of sale memorializing the transfer of a house and property from Budde to Florence Ledlow. This document reads: "Bill of Sale to Florence [illegible] Ledlow 9-22-75 of house and real property located in Andreski (sic) townsite near St. Marys, Ak. Registered with BLM Anchorage Office. For the sum of 1 Dollar and OVC. 9-22-75 L. D. Budde" (Exh. 2). Appellants further asserted in their applications that in late summer of 1976, Quqaqliq "surveyed over our boundary lines without permission." Appellants thereupon moved the Budde cabin to what later became lot 8, block 11. ^{1/} Appellants' applications describe a total of four houses (including the Budde cabin) on the four lots. Appellants submitted photographs taken in 1987 depicting these improvements. They asserted that in the summer of 1976, Larry Ledlow bought an old house from a Pete Andrews. This house, located on lot 9, block 11, burned in 1979. Appellants allege that the outlines of the foundations of this house can be seen on their photograph (Exh. 4). However, this allegation is disputed in the September 22, 1987, affidavit of Pete Andrews, Sr., who denied both that he sold the house to Ledlow and that the house was located on lot 9, block 11, when it burned down. According to their applications, in September 1976, appellants began clearing the land and subsequently built their permanent home, a gambrel roofed house on lot 4, block 10 (see Exh. 3). Appellants also began building a two-story building on lot 3, block 10, housing a workshop and guest quarters.

On June 16, 1987, the City of St. Mary's filed applications for trustee deeds to several lots, including lot 3, block 10, and lots 8 and 9, block 11, also claimed by appellants.

In her decision, the townsite trustee found that as of June 30, 1977, the Budde cabin and "the new house" built by appellants were located on lot 4, block 10. Based on a June 30, 1977, BLM aerial photograph, which she compared with appellants' photographs, the trustee found that lot 3, block 10, and lots 8 and 9, block 11, "were covered in brush and vacant" as of June 30, 1977. Citing 43 CFR 2565.3(c), the trustee approved appellants' application as to lot 4, block 10, by virtue of their occupancy and improvements on that lot prior to enactment of FLPMA. 43 CFR 2565.3(c)

^{1/} Appellant's Exhibit 1 is a plat of the Quqaqliq Subdivision. It depicts lots 3, 4, 8, and 9 within Tract B and contains appellants' annotations concerning their improvements.

provides in part: "Only those who were occupants of lots or entitled to such occupancy at the date of the approval of final subdivisional townsite survey * * * are entitled to the allotments herein provided." The trustee rejected appellants' claims to the other lots because she found that appellants had neither occupied nor improved these lots prior to the enactment of FLPMA.

In addition to the aerial photograph, the trustee's determination is based on the assertions of the September 28, 1987, Paul Dixon affidavit, and an October 9, 1987, letter from counsel for the City of St. Mary's.

Dixon alleged in his affidavit that at approximately 2 p.m. on September 26, 1978, Larry Ledlow, who had theretofore confined his occupation to lot 4, block 10, "entered onto Lot 3, Block [10] where '[s]urface material was excavated and foundations of a building were initiated'" (Affidavit at 8, Exh. K to Affidavit). Dixon further asserted that the Ledlow's occupation of lots 8 and 9, block 11, began on "October 20, 1978, when Mr. Ledlow moved a van * * * onto this portion of Tract B." Dixon asserted that he took photographs of the van in question on the day Ledlow occupied lots 8 and 9. However, copies of these photographs, attached to the affidavit as exhibit M, contain no discernible images. In a November 6, 1978, letter to Larry Ledlow, Dixon asked whether the van belonged to Ledlow. He also advised that the van was in trespass on Quqaqliq joint venture lands and "in the middle of the Yupik road Right-of-Way" (Affidavit at 10, Exh. L to Affidavit). Dixon further asserted that a map allegedly drawn by Budde and furnished to Dixon by Larry Ledlow demonstrates that the original Budde claim approximates the area of lot 4 block 10, and does not encompass all four lots claimed by the Ledlows (Affidavit at 11-12, Exh. N to Affidavit).

In his October 9, 1987, letter to the townsite trustee, counsel for the City of St. Mary's endorsed Dixon's interpretation of the Budde map, noting that the area staked on the ground did not comport with the distances stated on the map (Exh. N to Dixon Affidavit). Counsel further stated that BLM's aerial photograph of June 30, 1977, shows that the Ledlows "confined their occupancy to Lot 4 * * * and that only the improvements described by the Ledlows on the map/drawing submitted with their application were in existence on June 30, 1977" (Letter at 8-9). Counsel contended that this photograph "demonstrates" that the Ledlows' claims to occupancy of lots 3, 8, and 9 "are knowingly false" (Letter at 9). Counsel further asserted that the Ledlows only began to expand their claim (beyond lot 4) in August or September 1978.

Appellants maintain that they obtained the land embracing all four lots from Budde in 1975, and that this transfer is recorded in BLM's Anchorage Office. Appellants assert that Yupik Road, which separates lots 3 and 4 from lots 8 and 9, was built after 1977, and that they signed a "document of non objection to the road as a means of improving the northern half of their occupied land. Namely Lots 8 and 9, Block 11." Appellants point out that no road appears on BLM's June 30, 1977, aerial photograph, but that this photograph "clearly shows a trail leading north from the Ledlows' house to Lots 8 and 9," and that this area had been "cleared off."

Appellants further maintain that the Budde map contains no mistaken distances (Statement filed with the Board, Oct. 24, 1989, at 2). Appellants contend that lot 4 only came into existence as a result of Quqaqliq's survey, and that such survey could not define the limits of their occupancy. Appellants contend that on October 21, 1976, Florence Ledlow "used" the area encompassed by the four lots for her garden, berry picking, and harvesting tundra tea and grasses for her crafts, and that her occupancy was recognized by the Quqaqliq joint venture.

Counsel for the City of St. Mary's has filed a brief disputing the Ledlows' claim to lots 3, 8, and 9. Counsel states that the issue with respect to the Ledlows' claim is "the extent of the occupancy they acquired [from Budde] and the extent of their settlement occupancy or bona fide actual possession prior to October 21, 1976." Again, counsel argues that the Ledlows obtained only what Budde had, a parcel approximating the land later surveyed as lot 4. Counsel contends that to the extent the Ledlows' claim exceeds lot 4, their "entitlement must be based upon their settlement occupancy prior to October 21, 1976." Based on BLM's June 30, 1977, aerial photograph, no such claim is supportable. Counsel contends that the Quqaqliq survey did not compromise the Ledlows' claims, that the evidence "unquestionably shows they never expanded their occupancy beyond the area encompassed by Lot 4 block 10, USS 5507, prior to October 21, 1976," and that therefore the decision appealed from is correct.

[1] Section 11 of the Act of March 3, 1891, under which appellants filed their applications, provides for the entry of lands in Alaska "for town-site purposes, for the several use and benefit of the occupants of such town sites" by a trustee appointed by the Secretary of the Interior and that, upon entry, the Secretary "shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the townsite, including the survey of the land into lots." Section 3 of the Act of May 25, 1926, 43 U.S.C. § 735 (1970) (repealed by section 703(a) of FLPMA, P.L. 94-579, 90 Stat. 2789 (1976), subject to valid existing rights), essentially extended the provisions of section 11 of the Act of March 3, 1891, to Native townsites, subject to the same limitations and restrictions. See Aleknagik Natives, Ltd. v. United States, 635 F. Supp. 1477, 1497 (D. Alaska 1985).

In Royal Harris, 45 IBLA 87 (1980), appeal dismissed, Royal Harris v. Andrus, Civ. No. A 80-174 (D. Alaska), the Board held that repeal of the Townsite Acts by FLPMA on October 21, 1976, precluded the initiation of claims to townsite parcels based on occupancy initiated after that date. 45 IBLA at 89-90.

We agree with counsel for the City of St. Mary's that this case presents an issue as to the extent of the Ledlow's occupancy prior to October 21, 1976. That issue, however, cannot be resolved on the present state of the record. In her decision herein, the townsite trustee found, based on a comparison of BLM's aerial photograph with the 1987 photographs submitted by the Ledlows, that the Ledlows did not occupy lots 3, 8, and 9 prior to October 21, 1976. The trustee found that the Budde cabin and the Ledlows' new house were located on "Lot 4, Block 10 at the time of the BLM

photo" and that the other lots were "covered in brush and vacant." The BLM aerial photograph, without more, does not support these conclusions. First, BLM's aerial photograph purports to show the Ledlows' improvements situated on what, after the survey, was designated lot 4, block 10. The photograph is unsupported by any overlay or other supporting document indicating surveyed lot boundaries. Moreover, it is impossible to verify from a casual inspection of the photograph that the areas designated as lots 3, 8, and 9 "were covered in brush and vacant." By the same token, it is impossible to verify appellants' assertions that the photograph shows either a trail leading from their house to lots 8 and 9, or that clearing had occurred in those areas. Thus, both parties rely on the photograph as proving the ultimate issue; yet, the record is entirely devoid of foundation, authentication, or expert interpretation of the photograph. We find that the aerial photograph does not resolve the question of appellants' occupancy prior to October 21, 1976.

Several of appellants' July 1987 photographs purport to show improvements on all four lots with lot boundaries marked by felt tip pen. While these photographs tend to show the extent of appellants' occupation in July 1987, they are not probative of their occupation on October 21, 1976.

According to the Dixon affidavit, the Ledlows began to occupy lots 3, 8, and 9 in September and October 1978. The Dixon affidavit is silent as to whether any staking or other indicia of possession might have been in evidence on lots 3, 8, and 9 at the time of his inspection. ^{2/} Appellants maintain that their occupation preceded the enactment of FLPMA. It has been held that occupation or settlement does not require the establishment of residence but that the clear and unmistakable intention to possess must be evidenced on the ground. See City of Klawock v. Andrew, 24 IBLA 85, 95, 83 I.D. 47, 56 (1976), aff'd, City of Klawock v. Gustafson, Civ. No. K-74-2 (D. Alaska Nov. 11, 1976). In view of appellants' challenges in their applications and on appeal, the assertions in the Dixon affidavit that appellants failed to occupy the lots in question on the crucial date can-not be accepted as conclusive.

^{2/} Dixon stated in his affidavit that one Marlin Virg-in also had a claim to property within Tract B. Addressing Virg-in's claim, Dixon stated:

"On or about June 12, 1976 I made an extensive personal tour of all the land in Tract B in search of any survey markers or monuments that may have indicated any prior claims to Tract B of which the joint venture was unaware. I found no such markers at the time I made such survey and dispute Mr. Virg-in's statement that his claim was staked in December of 1975."

Dixon stated further that in June 1976, Virg-in moved some buildings onto Tract B with survey markers placed around them. Dixon advised Virg-in that he was in trespass on Quqaqliq joint venture land. According to Dixon, in August 1976, Virg-in "removed the stakes placed on Tract B by the joint venture and threw them at me." Thereafter, Virg-in was assured that his claim would be recognized by the joint venture (Affidavit at 7-8).

Appellants' bill of sale from, and the map allegedly drawn by Larry Budde, are too vague to allow an accurate determination as to precisely what area was transferred from Budde to Florence Ledlow. Appellants have alleged but not shown that the transfer was recorded in the Alaska State Office. Appellants have alleged but not demonstrated that they originally received a 400- by 400-foot parcel from Budde. Since the size of the parcel transferred from Budde to Florence Ledlow is not established, we are not persuaded by counsel's argument that the map (Exh. N to Dixon affidavit) approximates what later became lot 4.

Because the record contains unresolved factual issues we will refer the case for a hearing before an Administrative Law Judge pursuant to 43 CFR 4.415. At the hearing the burden will be on appellants to establish occupancy of the lots in question as of October 21, 1976. After conducting the hearing, the Judge will issue a decision which will be final for the Department unless appealed to the Board pursuant to 43 CFR 4.410.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division for assignment of an Administrative Law Judge.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge